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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

PAUL E. RABIN AND JANETTE L. RABIN,
Petitioners,

VS.

AMERICA'S FAVORITE CHICKEN COMPANY;
ALVIN C. COPELAND;
NEW ORLEANS SPICE COMPANY;
MY FAVORITE YEAR, INC.,
Respondents

On Petition for Writ of Certiorari or Other Appropriate Writ to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the United States Court of Appeals for the Fifth Circuit (the Court) be commanded to consider Petitioners Paul Rabin and Janette Rabin's appeal on the merits:

(a) When an application for extension of time in which to file an Opening Brief duly made, being pending and not yet ruled upon, was denied by the Court three days **after** the deadline for filing a brief had passed?

(b) When an Opening Brief, accompanied by a motion for leave to file a brief out of time, was forwarded to the Court, within three days after receiving **telephonic notice** of an order denying the Rabins' motion for extension of time in which to file an Opening Brief?

(c) When an Opening Brief, accompanied by a motion for leave to file a brief out of time, was forwarded to the Court, **prior to receipt** of the written Order denying a motion for extension of time in which to file an Opening Brief?

(d) When an Opening Brief accompanied by a motion for leave to file a brief out of time, was forwarded to the Court **within seven days** after the last date to file brief, and prior to the Court's written ruling on the motion for an extension of time?

2. Should the United States Court of Appeals for the Fifth Circuit be commanded to grant Petitioners Paul Rabin and Janette Rabin's motion to set aside dismissal/default and reinstate their appeal, based upon the filing an Opening Brief seven days late and be commanded to consider Petitioners' appeal on the merits?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

BASIS FOR JURISDICTION

The United States Supreme Court has jurisdiction of this writ, pursuant to its power to review a final judgment of the United States Court of Appeals, and pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

(i) The date the Order Denying Petitioners Janette and Paul Rabin's Motion for File a Brief Out of Time was filed, was March 19, 1997.

(ii) The date the Order/Judgment dismissing Petitioners Janette and Paul Rabin's appeal was filed, was March 19, 1997.

(iii) The date the Order Denying Petitioners Janette and Paul Rabin's Motion for Reconsideration and/ or Motion for Order to Set Aside Dismissal/Default and Reinstate Appeal was filed, was April 22, 1997.[1]

Judgement for the Court of Appeals for the Fifth Circuit dismissing Petitioners Appeal for failure to prosecute was filed on March 19, 1997. Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, June 17, 1997 is the due date for filing of this petition.

STATUTES AND RULES INVOLVED IN THE CASE

The following statutes and rules are involved in this case:

1. **Rule 10 of the Rules of the Supreme Court**, which states in pertinent part:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:

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[1] A renewed Motion to Set Aside Default for excusable neglect, inadvertence and mistake was filed on May 29, 1997. Said Motion has not been ruled upon as of the date of this Petition. However, this Petition was required to be filed, in order to preserve Petitioners' right to appeal from the Judgment of Dismissal of their appeal and subsequent denial of their Motion to Set Aside the Dismissal/Default and Reinstate the Appeal.

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided a federal question in a way that conflicts with a decision by a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power.*

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, *or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*" (Emphasis added).

2. **Federal Rules of Appellate Procedure, Rule 31**, which states in pertinent part:

"(a) The appellant shall serve and file a brief within 40 days after the date on which the record is filed . . ."

3. **Federal Rules of Appellate Procedure, Rule 26(b)**, which states in pertinent part:

"(a) The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal . . ."

4. **Fifth Circuit Rules, Rule 42.3**, pursuant to which Petitioners' appeal was dismissed:

"42.3.1.2 Appeals Without Counsel: The clerk shall issue a notice to appellant that upon the expiration of 15 days from the date thereof the appeal may be

dismissed for want of prosecution unless prior to that date the default is remedied. If the default is remedied within that time the clerk shall not dismiss the appeal for want of prosecution.

42.3.2 In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the court, the clerk shall enter an order dismissing the appeal for want of prosecution.

42.3.3 In all instances for failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 A copy of an order dismissing an appeal for want of prosecution shall be issued to the clerk of the district court as the mandate."

5. **Fifth Circuit Rules, Rule 42.4**, states in pertinent part:

"42.4 In acting on a motion under Loc. R. 27.1.7 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party to such an appeal desiring reinstatement of it, or an extension of time within which reinstatement of it may be sought, shall notify the clerk in writing within the time period allowed for reinstatement. This procedure will not apply in those instances where a stay is sought pending a decision of this court in another case, a decision of the supreme court or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal shall be deemed dismissed with prejudice. *However, an additional period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, inadvertence, or excusable neglect of counsel, or a pro se litigant.*"

6. **Federal Rules of Civil Procedure, Rule 60**, which provides in pertinent part:

> "(b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered . . ."

STATEMENT OF THE CASE

Petitioners, Paul Rabin and Janette Rabin, husband and wife, acting in *pro se*, hereby respectfully request this Court for a review of a judgment of dismissal on certiorari, or other appropriate writ, in order to require the Court of Appeals for the Fifth Circuit to consider their appeal, on its merits. In this regard, petitioners state as follows:

1. On June 6, 1989, Respondent America's Favorite Chicken Company[2] ("AFC") filed this action in the U.S. District Court for the Eastern District of Louisiana (hereinafter "district court" or "lower court") based on the court's diversity jurisdiction under 28 U.S.C. § 1332.

2. The defendants in the action, Paul Rabin and Janette Rabin are citizens of the State of California. They were the guarantors in connection with certain franchise agreements executed on behalf of Cajun Enterprises, Inc. Dan and Harriet Anaya and Cajun Enterprises, Inc., were also sued as defendants, in the same action. In the United States

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[2] AFC's predecessor, Biscuit Investments, Inc., was the named counterclaimant at the time. Biscuit Investments, Inc., after various predecessors and prior to bankruptcy, was the franchisor of Popeye's restaurants.

District Court, all of the defendants were represented by the same counsel.

3. Paul and Janette Rabin and the Anayas and Cajun Enterprises, Inc., originally filed their counterclaims on September 1, 1989, based on, inter alia, AFC's misrepresentations, fraudulent concealment, breaches of contract and breaches of the implied covenant of good faith and fair dealing. The Rabins, the Anayas and Cajun Enterprises, Inc., filed third party claims against Appellees Alvin C. Copeland, Sr., Diversified Foods and Seasonings, Inc. ("DFS")[3] and Copeland's of New Orleans, Inc. ("CNO")[4] on December 27, 1990, based on, *inter alia*, tortious interference.

4. On March 28, 1996, the U.S. District Court for the Eastern District of Louisiana entered summary judgment, dismissing the Rabins' claims for AFC's alleged violations of the California Franchise Investment Law, the Louisiana Unfair Trade Practices Act and certain issues regarding AFC's alleged breach of contract. On April 1, 1996, the district court entered summary judgment in favor of DFS and CNO for claims based on tortious interference with contract. On June 5, 1996, the district court granted in part AFC's second motion for summary judgment. It is the Rabins' contention that said dismissals and grants of the motions for summary judgment were erroneous, since the franchises were located in California, and the franchisees, residents of California, were protected by certain legislation enacted in California.

5. The parties proceeded to trial on June 17, 1996, and a verdict was entered in favor of AFC and Alvin C. Copeland,

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[3] DFS's predecessor, New Orleans Spice Company, was the named third party defendant at the time.

[4] CNO's predecessor, My Favorite Year, Inc., was the named third party defendant at the time.

Sr. on AFC's claims, all of the remaining counterclaims and the sole remaining third party claim.

6. The district court subsequently entered Judgment against the guarantors, Paul and Janette Rabin, in the sum of $393,839.99 on July 8, 1996. The court denied defendants' motion for a new trial or in the alternative, motion for judgment notwithstanding the verdict, granted plaintiff's motion for award of attorneys' fees and entered an Addendum to the Judgment for said fees in the amount of $537,350.55, on August 15, 1996.

7. This case involved significant legal issues that affect independent franchisees across this country in every franchise system. Specifically, this case concerned the extent to which a franchisor may avoid the effect of state statutes enacted in the franchisee's home state to protect against franchise sales abuses, i.e., the use of false or misleading sales materials and representations. This case also concerned the limitations imposed by law on the exercise of a franchisor's discretion with respect to the extent of the services and assistance rendered to the franchisee. This case also involved the duty of the creditor (franchisor) to disclose known facts, to the guarantors of the franchisee, where those facts materially increase the risk undertaken by the guarantor.

8. Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, the Rabins, acting in pro se, **filed a timely Notice of Appeal on September 10, 1996.** The record was timely designated on September 19, 1996. The case was assigned an Appeal No. 96-30956.[5] A separate Notice of Appeal was filed by Harriet Anaya and Cajun Enterprises. Cajun Enterprises is the principal, on whose behalf the Rabins executed the guarantees.

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[5] Subsequently, after dismissal of the Rabins' appeal, the Case No. was changed to 96-30957.

9. On October 28, 1996, after the Notice of Appeal had been filed in this case, PAUL and Janette Rabin commenced a proceeding under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California. Petitioners were advised by their bankruptcy attorney that the commencement of a Chapter 7 proceeding results in an automatic stay of their appeal, and hence they did not prepare an Opening Brief.

10. The Notice of Commencement of the Chapter 7 proceeding was forwarded to the United States Court of Appeal for the Fifth Circuit and was filed on December 13, 1996.

11. On January 7, 1997, petitioners were served with a notice from the Court of Appeal for the Fifth Circuit, indicating that if the Appellants' Opening Brief was not filed within 15 days, their appeal would be dismissed. This notice was received by Paul Rabin (resident of California), on January 15, 1997. Pursuant to the notice, the Opening Brief was due on January 22, 1997.

12. At the time petitioner Paul Rabin received the Notice from the U.S. Court of Appeals, he was undergoing treatment at the University of California, San Francisco, Medical Center. He had been suffering from ill health for at least the past two months, and was undergoing a series of tests at the Medical Center. Paul Rabin was diagnosed as having severe complications of diabetes, and previously had undergone heart surgery for insertion of a pacemaker. He was having opthamological problems relating to the diabetes and was scheduled for appointments with specialists for his eye problems. He also scheduled oral surgery during January of 1997. Additionally, since September, 1996, petitioners had been requesting their former attorneys to provide them specified copies of documents which were necessary for the preparation of their Opening Brief. Despite repeated requests, the former attorneys had not done so.

13. The Court of Appeal granted one extension of time to the petitioners to file their Opening Brief. Pursuant to the one extension of time granted by the Court of Appeal, Petitioners' Opening Brief was due on *February 24, 1997.*

14. On or about *February 18, 1997*, Paul and Janette Rabin forwarded to the Court by overnight mail, and served upon the parties a second motion for extension of time to serve and file their Opening Brief. The reasons for requesting this second extension of time were as follows:

(a) Paul Rabin had regularly requested the attorneys who represented him in the trial in this case, namely the Law Offices of Zarco & Pardo and attorney Lawrence Ashe, to forward to him copies of documents which he believed were essential to his appeal, the requests were made beginning in September 1996. As of February 18, 1997, he had not received these documents (comprising over 4,000 pages) nor had an opportunity to review most of these documents.

(b) Paul Rabin had been suffering from severe complications of diabetes and also has heart problems which previously involved insertion of a pacemaker. As a result of his illness he was suffering from tremendous fatigue which is exacerbated by stress. Paul Rabin also suffers from eye problems as a result of the diabetes. These problems continued during the first half of February 1997. Appellees' counsels were aware of some of these problems, since Paul Rabin had to be seen in an emergency room twice, during the trial in this case. Paul Rabin offered to provide doctor's certificates to the Court of Appeal, documenting his medical problems, if it so required.

(c) Appellant Janette Rabin was unable to assist in the preparation of the appeal, since she had no knowledge of law or legal procedure.

15. On *February 19, 1997*, Petitioners received two large boxes of documents of approximately 4,500 pages. Upon receipt thereof, Paul Rabin immediately commenced preparing the Opening Brief on behalf of the appellants.

16. On *February 24, 1997*, the last day for filing the Opening Brief, the Court of Appeals had not ruled on the Motion for Extension of Time to file an Opening Brief.

17. On *February 27, 1997*, after the last date to file an Opening Brief, Paul Rabin received a telephone call from the Clerk of the United States Court of Appeal for the Fifth Circuit, Connie Boersma, who stated that Paul and Janette Rabin's motion for an extension of time to file the Opening Brief had been denied; and informed Paul E. Rabin that there was no time left in which to file a brief. Had the denial occurred prior to the date on which the Opening Brief was due, i.e., prior to *February 24, 1997*, the Rabins would have made every effort to get their brief in, in time for the February 24, 1997 deadline.

18. No written order denying the motion for order granting an extension of time to file the Opening Brief, was received by the Petitioners from the Court of Appeals, until *March 3, 1997*, although said Order was filed on February 26, 1997. A true and correct copy of the Order denying the Motion for Extension of Time to File an Opening Brief filed on February 26, 1997, is attached hereto, in the Appendix. Said Order stated:

> "IT IS ORDERED that appellants Janette Rabin and Paul Rabin's motion for a second extension of 30 days, or, to and including March 5, 1997, to file their brief is DENIED."

By the date the Order was received and prior to March 5, 1997, Paul and Janette Rabin had already forwarded their Opening Brief; Appendix and pamphlets to the U.S. Court of Appeal for the Fifth Circuit, by overnight mail.

19. Thus, on March 3, 1997, *within two working days* of the telephone call from the Clerk of the Court of Appeal, informing Petitioner Paul E. Rabin that Appellants' motion for extension of time to file an Opening Brief to March 5, 1997, had been denied, Paul and Janette Rabin had forwarded the original and seven copies of Appellants Paul Rabin's and Janette Rabin's Opening Brief; the Appendix thereto; and a pamphlet of statutes, etc., in full compliance with the Rules of the Court of Appeals for the Fifth Circuit. The Opening Brief, Appendix and pamphlet were forwarded to the Court of Appeal by overnight mail. Paul Rabin confirmed by telephone call to the Clerk of the Court, that the Opening Brief, Appendix and pamphlet were received by the Court of Appeal, on March 4, 1997. Accompanying the Opening Brief, Appendix and pamphlet, was a Motion for Order granting leave to file Appellants' Opening Brief, out of time. The delay that occurred was a sum total of seven days, i.e. from February 24, 1997 - March 3, 1997.

20. On *March 19, 1997*, the Honorable Fortunato P. Benavides, United States Circuit Judge filed an Order *Denying* Paul and Janette Rabin's Motion for Leave to File Their Brief out of time, without supplying any reasons. On *March 19, 1997*, the Clerk entered a Judgment under Local Rule 42.3, dismissing Paul and Janette Rabin's appeal for want of prosecution. True and correct copies of the Order Denying Appellants' Motion to File their Brief, Out of Time and the Judgment of Dismissal is attached to the Appendix, hereto.

21. Appellants Rabins' Opening Brief and copies thereof, Appendix and pamphlet have been retained by the Court and/or have not been returned to the Rabins.

22. On *March 28, 1997*, within less than ten days of the Order Denying their Motion to File a Brief out of time, Paul and Janette Rabin filed a Motion for Reconsideration of Judge Benavides' Order; for a Motion to Set Aside the

Dismissal and/or to Set Aside their Default Based upon Inadvertence and Excusable Neglect; for an Order Reinstating their Appeal; for Recall of Mandate; and for Order Granting Leave to File their Opening Brief. The grounds for the Motion to Set Aside Default/Dismissal were: (a) Paul Rabin's ill health; (b) the failure to timely receive important documents necessary to prepare the appeal,, from former counsel, despite repeated requests made to counsel dating from September of 1996; (c) lack of prejudice to the respondents, who had obtained an extension of time to file their brief until May 19, 1997; (d) lack of prejudice to the respondents, since they had been served with Paul and Janette Rabin's Opening Brief on March 3, 1997; (e) tremendous prejudice to the appellants, if their appeal was dismissed because the Opening Brief was filed a total of seven days late; (f) similarity of issues raised in the Rabins' Opening Brief and Opening Brief of co-appellants Cajun Enterprises and Harriet Anaya.

23. The issues raised in Paul and Janette Rabin's Opening Brief are practically identical to the issues raised by co-appellants Harriet Anaya and Cajun Enterprises, Inc. Co-appellants, represented by counsel, had been granted *two* extensions of time within which to file their Opening Brief. These appellants, acting in *pro se*, were granted only *one* extension of time within which to file their Opening Brief, despite the fact that the Court had been informed that appellant Paul Rabin was suffering from severe health problems, for at least the last two months.

24. On *March 24, 1997*, counsel representing America's Favorite Chicken, forwarded Paul and Janette Rabin a letter stating that they were confirming a telephone conversation in which all of the appellees had received an extension of time through May 19, 1997, to serve and file the Appellees' Brief. This was sufficient to justify reconsideration of Judge Benavides' Order denying the motion to file a brief out of

time and for an order setting aside the default, since no prejudice would be caused to the appellees, based upon the short 7-day delay in filing and serving the Opening Brief on March 3, 1997. Appellees would have a period of 45 days to respond to the Rabins' arguments, which were practically the same as co-appellants Harriet Anaya and Cajun Enterprises, Inc.'s arguments.

25. In the Motion to Set Aside the Default and Reinstate the Appeal, which was fully briefed, Paul Rabin drew the Court's attention to the severe health problems that he had been suffering during January, and early-February, 1997. He also pointed out that he had not received documents essential to his appeal from previous counsel (now representing co-appellants Harriet Anaya and Cajun Enterprises, Inc.), until February 19, 1997, despite having requested those documents, on many occasions, dating back to September, 1996. The Rabins pointed out that the issues raised in their Opening Brief were substantially similar to the issues raised in co-appellants' Cajun Enterprises, Inc., and Harriet Anaya's Opening Brief, with the exception of certain surety issues. It was pointed out that the appellees had obtained an extension of time through May 19, 1997, within which to file their Respondent's Brief. They had considerable time within which to respond to the Rabins' Opening Brief and could suffer no prejudice based upon the slight delay. However, the Rabins would suffer substantial prejudice if their appeal was not determined on the merits, since a judgment of approximately $930,000.00 had been entered against them, based upon certain guarantees they had executed on behalf of Cajun Enterprises.

26. On *April 22, 1997*, the Court of Appeal for the Fifth Circuit *denied* Paul and Janette Rabin's Motion for Reconsideration of Judge Benavides' Order; for Motion to Set Aside the Dismissal and/or Default Based upon Inadvertence and Excusable Neglect; for Order Reinstating their

Appeal and for Order Granting Leave to File their Opening Brief. A true and correct copy of the Order Denying the Rabins' Motion is attached to the Appendix, hereto.

27. On May 29, 1997, Paul and Janette Rabin filed one more motion in the Court of Appeal requesting that their default be set aside for excusable neglect, inadvertence and mistake. The Court of Appeal has not ruled upon their Motion. However, in order to preserve their right to seek a review of the judgment of dismissal by the Court of Appeals filed on March 19, 1997, petitioners Janette and Paul Rabin have been compelled to file this Petition for Writ of Certiorari.

28. Paul and Janette Rabin have, in good faith, taken all steps to seek a consideration of their appeal, on the merits, in the United States Court of Appeals for the Fifth Circuit, including the following:

(a) A Motion for Extension of Time to File an Opening Brief;

(b) A Motion Granting Leave to File a Brief Out of Time (seven days late);

(c) A Motion for Reconsideration of Judge Benavides' Order; for Motion to Set Aside the Dismissal and/or Default Based upon Inadvertence and Excusable Neglect; for Order Reinstating their Appeal and for Order Granting Leave to File their Opening Brief;

(d) A further Motion to Set Aside Default based upon Inadvertence and Excusable Neglect.

The first three motions were denied by the Court of Appeal. The fourth motion filed on May 29, 1997, is pending and has not yet been ruled upon.

29. Grave and irreparable injury will be suffered by Paul and Janette Rabin if their appeal is dismissed on a technical ground, i.e., a seven-day delay in filing the Opening Brief. It

is submitted that there are numerous important issues raised in this appeal, including an issue of which certification to the Louisiana Supreme Court is requested. The issues merit a consideration of the appeal, on its merits.

30. Paul and Janette Rabin have no other legal remedy, except to petition this Court for a writ of certiorari reviewing the judgment of dismissal by the Court of Appeals for the Fifth Circuit and an order to that Court to determine their appeal on the merits, as set forth in the Opening Brief lodged by the appellants, on March 3, 1997.

ARGUMENT

1. PETITIONERS ARE REQUESTING A REVIEW OF THE COURT OF APPEALS' DISMISSAL OF THEIR ACTION AND AN ORDER REQUIRING A DETERMINATION OF THEIR APPEAL, ON THE MERITS:

Rule 10 of the Rules of the Supreme Court, states in pertinent part:

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided a federal question in a way that conflicts with a decision by a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower*

court , as to call for an exercise of the Court's supervisory power . . .

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, *or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*" (Emphasis added).

Petitioners Paul and Janette Rabin respectfully submit that they have taken all possible steps to obtain a consideration of their appeal on the merits. Their motion for extension of time to file an Opening Brief was denied by the Court of Appeal, after the last date to file the Opening Brief. They were not even allowed three days from the date of the denial, within which to submit their Opening Brief, after the deadline to file the brief had passed, without a ruling on their motion for extension. Appellant Paul and Janette Rabin's Opening Brief and Appendix were forwarded to the Court of Appeal and served upon opposing counsel, *only seven days after the deadline for filing the Opening Brief;* only two working days after the telephone call from the Court of Appeals that their Motion for Extension of Time to File a Brief had been denied; and before receipt of an Order from the Court, denying their Motion for extension of time to file an Opening Brief. The prejudice which will be suffered by the defendants in having their appeal dismissed is extremely grave, since a judgment of approximately $930,000.00 had been entered against them, based upon guarantees that they executed on behalf of Cajun Enterprises.

There is a strong judicial policy favoring a resolution of an appeal on its merits. Pursuant to Fifth Circuit Local Rule 42.4, the Court was empowered to grant relief from a dismissal with prejudice, **which resulted from mistake, inadvertence or excusable neglect of counsel or a pro se litigant**. The U.S. Supreme Court

has analyzed the circumstances in which missing a filing deadline counts as "excusable" or "inexcusable" neglect in *Pioneer Insurance Services Co. v Brunswick Associates Ltd. Partnership* 503 U.S. 380 (1993). In that case, creditors of a Chapter 11 debtor sought to extend the bar date for filing proofs of claim under a bankruptcy rule (Rule 9006(b)) which gave discretion to the court to allow late filings where lateness was the result of excusable neglect. Respondents received a notice from the bankruptcy court informing them that they must file proofs of claims by a certain bar date. Respondents then hired a bankruptcy attorney to represent them and gave the attorney their file containing the notice. Respondents later asked the attorney whether there was a bar date for claims, to which the attorney incorrectly responded that no such date had been set, and therefore, there was no urgency in filing proofs of claim. As a result, respondents failed to file before the bar date. Upon discovering their error, respondents moved for an extension of time on grounds of excusable neglect. The bankruptcy court denied their motion and held that excusable neglect could only be the result of something beyond that party's reasonable control. The Supreme Court analyzed a variety of statutory uses of the term "excusable neglect" in order to analogize to the bankruptcy context. It explained that "neglect" has its normal, expected meaning, i.e., negligence, carelessness, inadvertent mistake:

"Although inadvertence, ignorance of rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 60(b) is a somewhat 'elastic concept' and is not limited to omissions caused by circumstances beyond the control of the movant." (Id at p. 391).

The Supreme Court then went on to explain that "at least for the purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence (Id. at p. 394). In light of its interpretation of "neglect" as "negligence," the Court said that the "excusable" portion of the term would provide the limitations necessary to prevent abuse by the parties. It therefore suggested the following analysis of "excusable":

> "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant and whether the movant acted in good faith." (Id at p. 395) (Emphasis added).

These four enumerated factors, while not an exclusive list, provide a framework with which to determine whether missing a filing deadline constitutes "excusable neglect." In this case, appellants Paul and Janette Rabin believed that in the event their Motion for Extension of Time to file an Opening Brief was denied, the Court would at least allow them a short period to correct their default. However, the Court of Appeal denied their Motion for Extension of Time *after the last date on which the Opening Brief was due*, and then refused to allow filing of a Brief, submitted only three days after telephonic notice of the denial. The actual order of denial was not received by Paul Rabin until after the Brief and Appendix had been forwarded by overnight mail to the Court of Appeals, along with a motion to file a brief, out of time.

It appears that the Court of Appeals for the Fifth Circuit failed to take into consideration the four factors enunciated by the Supreme Court, i.e., the danger of prejudice to the respondents based upon the short delay; the length of delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith.[6] Had it given consideration to the four factors enunciated by the Supreme Court, it would have either: (a) granted petitioners' motion for extension of time; or (b) granted petitioners' motion to file their brief out of time; or (c) granted petitioners' motion to set aside dismissal/default and reinstate appellants' appeal. There was a mere *seven-day delay* in filing the Opening Brief. The Opening Brief was due on *February 24, 1997*. It was forwarded by overnight mail to the Court on *March 3, 1997*. By Order filed *February 26, 1997*, the Court of Appeals denied Petitioners' request for a second extension of time to file their Opening Brief, to and including *March 5, 1997*. Petitioners' Opening Brief was forwarded to the Court of Appeals by overnight mail, *prior to March 5, 1997, i.e., by March 3, 1997*. The facts in this case clearly demonstrated excusable neglect, inadvertence or mistake on the part of the appellants (pro se litigants).

It is respectfully submitted that Petitioners delay was excusable and they acted with reasonable promptness to remedy any default in their failure to timely forward their brief. On Thursday, February 27, 1997, appellant Paul Rabin received a telephone call from the Deputy Clerk of the Court of Appeals, Connie Boersma, that Paul and Janette Rabin's motion for extension of time to file an Opening Brief had been denied. Whereupon, the Opening

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[6] Since no reasons were supplied by the Court of Appeals for the denials of petitioners' motions, petitioners are unable to determine the exact basis for the denial.

Brief was forwarded to the Court on Monday, March 3, 1997, **within three days** of the telephone call. The actual order denying petitioners' motion for an extension of time to file an Opening Brief was not received until *after* the Opening Brief had been forwarded to the Court, by overnight mail. Petitioners' Opening Brief was accompanied by a motion for leave to file the Opening Brief, out of time. This motion was also denied by the Court of Appeal, and their appeal was dismissed. Thereafter, their effort to set aside the default for mistake and excusable neglect, was proved futile. There was no prejudice to the appellees, since they obtained an extension through May 19, 1997, to serve and file their Appellees' Brief.

In *Committee for Idaho's High Desert Inc. v Yost* 92 F.3d 914 (9th Cir. 1996), the court held that the Supreme Court's analysis of "excusable neglect" in Pioneer is applicable to Rule 6(b) and also noted a prior holding, holding that the analysis is applicable to Federal Rules of Appellate Procedure, Rule 4(a)(5).

Petitioners have exhausted their recourse in the Court of Appeals for the Fifth Circuit. All of their efforts to obtain a consideration of their appeal, on the merits, have been in vain. The Court of Appeals refuses to follow the Supreme Court ruling in Pioneer, and petitioners have only this Court, as their last resort. Their only recourse is to seek a review of the judgment of the Court of Appeal, by a writ of certiorari, other appropriate writ, commanding the Court of Appeal to set aside their default and consider their appeal, on the merits.

PRAYER

WHEREFORE, Petitioners Paul and Janette Rabin respectfully pray that this Court:

1. Review the judgment of the Court of Appeals for the Fifth Circuit, dismissing their appeal, and order that their appeal be considered on the merits.

3. Award Petitioners their costs incurred in this proceeding.

4. For such other relief as this Court deems appropriate.

DATED: May 28, 1997

PAUL E. RABIN
Petitioner
In Pro Se

JANETTE RABIN
PETITIONER
IN PRO SE

APPENDIX

Order filed Feb. 26, 1997 denying appellants' second request for extension of time 1

Order filed March 19, 1997 denying appellants' motion to file brief out of time..... 2

Judgment of Dismissal filed March 19, 1997 3

Letter to Loretta Whyte, March 19, 1997, enclosing certified copy of judgement issued as mandate..... 4

Order of April 22, 1997 denying appellants' motion to recall mandate, to reconsider appellants' request to file brief out of time, and to set aside dismissal of appeal and to reinstate the appeal 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30956

AMERICA'S FAVORITE CHICKEN COMPANY
Plaintiff - Appellee

v.

CAJUN ENT INC, ET AL
Defendants

CAJUN ENT INC; HARRIETT SANDY ANAYA, as personal representative of the Estate of Daniel M. Anaya; JANETTE RABIN; PAUL E RABIN
Defendants - Appellants

v.

ALVIN C. COPELAND; NEW ORLEANS SPICE CO; MY FAVORITE YEAR INC;
Third Party - Defendants-Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

U.S. COURT OF APPEALS
FILED FEB. 26, 1997
CHARLES R. FULBRUGE III, CLERK

ORDER:

IT IS ORDERED that appellants Janette Rabin and Paul Rabin's motion for a second extension of 30 days, or, to and including March 5, 1997 to file their brief is DENIED.

/s/ FORTUNATO P. BENAVIDES
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30956

AMERICA'S FAVORITE CHICKEN COMPANY
Plaintiff - Appellee

v.

CAJUN ENT INC, ET AL
Defendants

CAJUN ENT INC; HARRIETT SANDY ANAYA, as personal representative of the Estate of Daniel M. Anaya; JANETTE RABIN; PAUL E RABIN
Defendants - Appellants

v.

ALVIN C. COPELAND; NEW ORLEANS SPICE CO; MY FAVORITE YEAR INC;
Third Party - Defendants-Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

U.S. COURT OF APPEALS
FILED FEB. 26, 1997
CHARLES R. FULBRUGE III, CLERK

ORDER:

IT IS ORDERED that the motion of appellants, Paul Rabin and Janette Rabin to file their brief out of time is DENIED.

/s/ FORTUNATO P. BENAVIDES
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30956

AMERICA'S FAVORITE CHICKEN COMPANY
Plaintiff - Appellee,

v.

CAJUN ENT INC, ET AL
Defendants

CAJUN ENT INC; HARRIETT SANDY ANAYA, as personal representative of the Estate of Daniel M Anaya; JANETTE RABIN; PAUL E. RABIN
Defendants - Appellants

v.

ALVIN C COPELAND; NEW ORLEANS SPICE CO; MY FAVORITE YEAR INC;
Third Party - Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

U.S. COURT OF APPEALS
FILED MARCH 19, 1997
CHARLES R. FULBRUGE III, CLERK

CLERK'S OFFICE:

Under Local Rule 42.3, the appeal of Janette Rabin and Paul E. Rabin is dismissed for want of prosecution for failure of appellants to file a brief, within the time fixed by the rules, this date, March 19, 1997.

CHARLES R. FULBRUGE III
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /s/ CONNIE BOERSMA
Connie Boersma, Deputy Clerk

FOR THE COURT — BY DIRECTION

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 604-589-4514
600 CAMP STREET
NEW ORLEANS, LA 70150

CHARLES R. FULBRUGE III
CLERK

March 19, 1997

Ms. Loretta Whyte, Clerk
Eastern District of Louisiana, New Orleans
United States District Court
500 Camp Street
Room C-151
New Orleans, LA 70130

No. 96-30956 America's Favorite v. Cajun Ent. *et al*
USDC No. 89-CV-2778-E

Enclosed is a certified copy of the judgment issued as the mandate. (as to appellants, Janette and Paul Rabin only)

Record/original papers/exhibits are to be returned when the remaining appellants' mandate issues.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: CONNIE BOERSMAN
Connie Boersman, Deputy Clerk

cc: w/encl:
Mr. James C. Rubinger
Ms. Janette Rabin
Mr. Paul E. Rabin
Mr. Robert A. Kutcher
Ms. Nicole S. Tygier
Mr. Steven W. Copley
Mr. Robert Zarco

P.S. Any future filings concerning the appeal of Cajun Enterprises Inc and Harriett Sandy Anays are to be referenced by using the Case No. 96-30957.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30956

AMERICA'S FAVORITE CHICKEN COMPANY

Plaintiff - Appellee,

v.

CAJUN ENT INC, ET AL

Defendants

CAJUN ENT INC; HARRIETT SANDY ANAYA, as personal representative of the Estate of Daniel M Anaya; JANETTE RABIN; PAUL E. RABIN

Defendants - Appellants

v.

ALVIN C COPELAND; NEW ORLEANS SPICE CO; MY FAVORITE YEAR INC;

Third Party - Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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U.S. COURT OF APPEALS
FILED APRIL 22, 1997
CHARLES R. FULBRUGE III, CLERK

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants to recall the mandate is DENIED.

IT IS FURTHER ORDERED that the motion of appellants to reconsider this Court's order of March 19, 1997, denying appellants' motion to file their brief out of time, is DENIED.

IT IS FURTHER ORDERED that the motion of appellants to set aside dismissal of appeal and to reinstate the appeal is DENIED.